IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 712 OF 2002

1. Harishchandra @ Harichandra Manakya Kini
2. Vidhyadhar H. Kini
3. Santosh H. Kini

All residents of Kalamb Rambhag, Palghar, Dist: Thane (At present detained at Yeravada Central Prison) Pune ..Appellants (Ori. Accused Nos. 1 to 3)

versus

State of Maharashtra (At the instance of Nalasopara Police Station ..Respondents

Mr. Prakash Naik for the Appellants.

Mrs. M. M. Deshmukh, APP for the Respondents - State.

CORAM : D. G. DESHPANDE, &
Smt. R. S. DALVI, JJ.

DATE : 23RD NOVEMBER, 2006

ORAL JUDGMENT : (Per : D. G. Deshpande, J.)

1. All the original three accused who were convicted by the IInd Adhoc Addl. Sessions Judge, Palghar by judgment dated 31.5.2002 for offences under Sections 307 r/w. 34 of IPC and sentenced to suffer R. I. for ten years with fine, for offence

under Section 302 r/w. 34 of IPC and sentenced to suffer for life and fine, have filed this Appeal, challenging their conviction.

2. We heard the counsel for the Appellants - accused and the learned APP.

3. At the outset, it has to be stated that the case of the prosecution as reflected by the FIR Exhibit 28 lodged by witness Prema Dayanand Patil is different than the case sought to be proved at the stage of trial, and the difference is not minor but there are material and major variation in the entire story. In her FIR complainant Prema has told that she resides at Navapur, Banglipada, Agashi Taluka, Vasai, Dist : Thane, along with her husband, three children and in-laws on 1.10.1998 in the morning at 9 O'clock, she has come to her maternal house at Kalamb Ranbhag along with her husband and children for Dassera. It was her brother's house i.e. house of Mahendra. Her brother has agricultural land by the sea side. On way to that land or field there is a house of Harichandra Manakya Kini - accused No.1 8-9 months before the incident Harichandra and his companions had assaulted Kishore Gowari, her cousin

with koitaa, axe etc. Kishore had lodged complaint with police station about this and consequently Harichandra - accused No.1 and his companions were arrested, and, therefore, relations between her brother and accused were strained. She further states in her FIR that on 2.10.1998 she had gone to the field of Mahendra at about 9 a.m. along with her brother Arvind, Murlidhar and cousin brother's wife Manda Vidyadhar Gowari. At about 2 in the afternoon all of them started from the field towards their home. Complainant Prema was ahead alongwith Manda and Murlidhar was following them. When they came near the field of Inas Soze, Murlidhar raised shouts. She therefore looked back and found that Murlidhar had collapsed on the ground and blood was oozing from his waist. Accused No.1 - Harichandra, Accused No.2 - Vidyadhar Harichandra Kini, Accused No.3 - Santosh Harichandra Kini and absconding accused Yogesh were running away after assaulting Murlidhar. Accused No.1 Harichandra had sickle, Accused No.2 Vidyadhar had a iron rod, absconding accused Yogesh had a sickle and accused No.3 Santosh had a trident - trishul. (In this case Accused No.1 Harichandra, Accused No.2 Vidyadhar and Accused No.3 Santosh are the only accused). Thereafter she has stated that

she, her cousin sister in law Manda raised hue and cry, and, therefore, then Arvind and persons residing in the neighbourhood of his house by name Rahul Gowari, Ranjit Gowari, Eknath Gharat, Vinay Nijai, Anant Gharat, Saroj Nijai, Vaijanti Kini, about 25-30 people came running. Some of them lifted Murlidhar and took him to the hospital by Rickshaw of Anil Kini.

4. She then states that she, other ladies and other people were there. At that time her brother Arvind Gowari - the deceased went towards the house of accused No.1 Harichandra to question him why he has assaulted Murlidhar. She also states that she and other ladies followed Arvind and then Accused No. 1 - Harichandra, Accused No.2 - Vidyadhar and Accused No.3 Santosh along with absconding accused came armed with weapons and Harichandra incited his sons to kill Arvind and then accused No. 3 Santosh inflicted trident in the stomach of Arvind and thereafter Harichandra and his sons went back to their house. We, i.e. the complainant and others brought Arvind upon the road by lifting him and by rickshaw he was taken to the hospital where doctor declared him dead after half an hour.

5. After Prema lodged this FIR, investigation was started, spot panchnama was prepared, dead body of Arvind was sent for post mortem after the inquest panchnama. Murlidhar was also given treatment in the hospital, statement of witnesses recorded, incriminating articles were seized from different accused. Accused were arrested, their clothes were seized, recoveries were made at the instance of the accused, all the articles recovered were sent to the forensic laboratory and on completion of investigation, charge sheet was filed.

6. During the trial, prosecution examined 14 witnesses. The defence of the accused was of total denial and false implication and the accused ultimately were found guilty of the offence stated above, and, therefore, this appeal.

7. At the outset, we would like to say that this appeal is required to be allowed and accused are entitled for acquittal for the following reasons:

. As per the FIR, first incident of assault upon Murlidhar took place in the field of Mahendra.

Prema - P.W. 4 complainant as per the FIR had not seen actual assault upon Murlidhar. She had seen Murlidhar lying on the ground with the blood injury to his waist and accused running with the weapons. Thereafter, 20-25 people assembled and then Murlidhar was taken to the hospital in rickshaw of Anil Kini, so that incident is over.

8. Then thereafter as per the FIR, Arvind came and he went to the house of accused No.1 Harichandra, to question him why Murlidhar was assaulted and the assault took place not in the field of Mahendra but near or in front of the house of accused No.1 Harichandra. However, in her evidence Prema - P.W. 4 has brought both these incidents at one place only and that is in the field of Inas Soj. In paragraph 2 of her deposition, she has stated about the assault on Murlidhar and then stated that **"by hearing the shouts brother Arvind came there, he asked the accused Harichandra why they assaulted his brother and at that time accused Harichandra abused and threatened Arvind and asked his sons to finish him and then accused Harichandra gave blow of spear on the chest of Arvind, Arvind collapsed on the ground, accused No.2 Vidyadhar gave a blow of sickle on the**

leg of Arvind, accused Yogesh gave a blow of Trident (Trishul) on the shoulder of Arvind. Due to that, Arvind lost his consciousness and he sustained bleeding injuries. Then the accused went towards their house and hearing their shouts villagers came". It will be clear from the aforesaid evidence of P.W. 4 Prema that she has given complete go-bye to the prosecution story in the FIR. If her oral evidence, as stated above, is believed then both the assaults took place in the field of Inas Soj, and Murlidhar and Arvind fell on the ground with bleeding injuries. Bleeding injuries on Arvind being very serious just at about a distance of 5 feet.

9. There was no reason for P.W. 4 to make any such change in the venue regarding the assault on Arvind. May be she has her own reasons but the story of assault to Arvind in the field, is falsified by the panchnama of the scene of offence also. This spot panchnama is proved by P.W. 2 Rajan Madan Gowari, the spot was shown by P.W. 4 Prema herself. Blood stained soil was found only at one place where Murlidhar was assaulted or was lying after the assault. It is specifically mentioned in the panchnama that the spot as shown by Prema of the

assault of Arvind was 5 ft. North to the spot where Murlidhar was assaulted but at that spot no blood stains / spots were found.

10. According to Prema's evidence three injuries with sharp edged weapons were inflicted on Arvind whereas Murlidhar had only one injury but there was bleeding at the spot where Murlidhar was lying and not even a single drop of blood where Arvind was lying after the assault. Story of Prema therefore becomes highly suspicious not only on this count but also because of change of place of assault on Arvind and bringing it to the field of Inas Soj.

11. We have already stated on the basis of the FIR that assault on Murlidhar and assault on Arvind, as per FIR were two separate incidents or instances. Assault on Murlidhar was followed by assembly of 15-20 people and removal of Murlidhar to the hospital in the rickshaw, and, may be after a lapse of time about which there is nothing in the FIR. Arvind went to the house of accused where the accused assaulted him. This is a story given in the FIR but there is no spot panchnama of the house of accused or house or courtyard or the place where Arvind was actually

assaulted. There is only one spot panchnama wherein both these assaults are shown to have occurred in the field of Inas Soj and the distance between place where Arvind was lying and Murlidhar was lying is only 5 ft. According to her (P.W. 4) testimony they went to the field of Mahendra in the morning at 9 a.m. and she had with her deceased Arvind, injured Murlidhar and her sister in law Manda. Therefore, according to this part of the evidence, Arvind was with them throughout from morning and while returning from the field at 2 O'clock all of them were there i.e. all of them were returning. But in the FIR, it is clear that Arvind was not there with them when Murlidhar was assaulted because in the FIR she has stated that Arvind came there after Murlidhar was removed to the hospital. This portion, we have reproduced earlier.

12. P.W. 6 Manda Gowari in her evidence has stated that on that day she, Prema, Murlidhar and Arvind had gone to the field. After the work was over they started returning at 2 O'clock, she and Prema were chit chatting and Murlidhar was following. When they reached the field of Inas Soj, they heard the shouts of Murlidhar, they turned back and saw

that Murlidhar collapsed on the ground and further according to her accused No.2 Vidyadhar gave blow of sickle on the hand of Murlidhar and thereafter Murlidhar fell down. Accused No.3 Santosh gave a blow of sickle at his waist. At that time, accused No.1 Harichandra and absconding accused Yogesh were present. Absconding accused Yogesh had a trident in his hand and accused No.1 Harichandra was holding a Barchi i.e. spear. Blood was oozing from the injuries of Murlidhar. At that time Arvind came running and questioned Accused No.1 Harichandra and at that time he was assaulted by all the accused. It will be clear from the evidence of Manda that she has also given the same story as given by P.W. 4 Prema. It is a totally contradictory to the story which is given in the FIR. At this juncture, it is necessary to consider the defence of accused. According to them, Murlidhar, Arvind and others had come to attack them in the evening in their house, they pelted stones, broke roof of the house of the accused and there was a fight between the two groups and three of the accused also received injuries in that fight. Accused have strongly relied upon for this purpose the medical certificate issued to them regarding the injuries on their person. It is at page 164 of the

paper book, issued by doctor on 3.10.1998. History given by all the three accused is a history of assault at 7.30 p.m. on 2.10.1998. Harichandra - Accused No.1 was found disoriented and feeling giddy, accused No. 3 Santosh had given same history of assault on his back by iron bar, there were multiple abrasions near shoulder, near midline, lumbar region, then assault on Santosh by iron bar, there was swelling and tenderness. So far as accused no.2 Vidyadhar is concerned, he had incised wound 1 1/2 cm. 1 mm x skin deep with swelling and tenderness, the wound was found fresh. He had also informed that he had been assaulted by fists blow on back and both legs. According to accused No.2 Vidyadhar, injury was caused by a sword.

13. Learned APP tried to contend that medical certificate was not proved and hence not exhibited, but when it is found that story given by Prema - P.W. 4 in her FIR, and the story given by her and Manda P.W. 6 is totally basically and materially different from the story given in the FIR and it appears that the defence raised by the accused is consistent and plausible because of the injuries suffered by them, the time of assault given by them at 7.30 p.m., all

fitting in the circumstances, there can be no hesitation in coming to the conclusion that the evidence of Prema and Manda not only does not inspire confidence but is liable to be rejected because of the material improvements.

14. Third eye witness is Murlidhar Harichandra Gowari P. W. 7. He has stated that on 2.10.1998 he was doing work in his field along with Manda and Prema. At about 2 p.m. to 2.15 p.m. all three of them were returning to their home. Manda and Prema were ahead of him at a distance of 15 to 20 feet and when they reached near the field of Inas Soj, all the three accused along with absconding accused Yogesh came there from their house side, he turned back and then accused No.2 Vidyadhar gave a blow of sickle on his left palm due to that his leg tangled with a nylon knot affixed to the boundaries of Inas Soj field and he fell on the ground. Thereafter, accused No.3 Santosh gave a blow of sickle on his right side rib, accused No.1 Harichandra was having a barchi (spear) and absconding accused Yogesh had a Trishul. He then became unconscious. He does not say anything about any assault on Arvind.

15. If the evidence of this witness Murlidhar is compared with the evidence of Prema and Manda, the falsity of the prosecution case gets intensified. According to Prema and Manda, Arvind and Murlidhar were assaulted at the same place (as per panchnama the distance is 5 ft. only). They were assaulted in succession by the accused without any time gap and if that is so then P.W. 7 Murlidhar not stating anything about the assault on Arvind either before the court or before the police, is a very very strong circumstance to disbelieve the entire prosecution case.

16. It is necessary at this juncture to see the medical (injury) certificate relating to Murlidhar. As per this certificate Murlidhar has two injuries by sharp object, incise wound on back 4 cm x 7 cm muscle deep and incise wound on left hand 2 cm. x 5 cm. If these injuries are seen, it is difficult to believe that Murlidhar would become unconscious within minutes of assault so as not able to see the assault on Arvind, which according to the evidence in court of Prema and Manda immediately followed.

17. Story given by all the three witnesses

Prema, Manda and Murlidhar has got to be rejected for all these serious lapses, lacunae and improvements.

18. Story given in the FIR that Murlidhar was assaulted and he was removed to the hospital, gets corroborated and strengthened by the evidence of P.W. 5 Madan Gowari. He has stated that at about 2 p.m. he was in his house, he heard shouts, he came out Ajay Gowari, Ajay Kini and wife of Murlidhar, brought Murlidhar near rickshaw stand. He saw injuries on the right side waist and on the fingers of Murlidhar and he carried Murlidhar in rickshaw at Nalasopara police station.

19. If the oral evidence given by Manda and Prema is accepted that Murlidhar and Arvind were assaulted in succession at the same spot, then Murlidhar alone would not have been shifted to hospital, Arvind would also have been taken to the hospital. Therefore, it is clear that story given in the FIR is totally different and the story given in the evidence by Manda, Prema and Murlidhar is totally different.

20. Prosecution also examined P.W. 1 Bharat

Gharat. He has also fallen in line with Prema and Manda in giving a false story. He has stated that on 2.10.1998 he was at his house. At that time daughter of one Ramesh Gowari came and informed him that Harichandra and his sons assaulted Arvind and Murlidhar. He therefore immediately went to the house of Arvind. He saw that in the place of Inas Soj, Murlidhar and Arvind both were lying in injured condition.

21. This is also a falsity of the witnesses. Arvind and Murlidhar as per the FIR could not be seen together in injured condition by any one because Murlidhar was shifted to the hospital and thereafter assault on Arvind took place. Further this witness most surprisingly does not utter a single word as to who shifted Murlidhar from that place to the hospital. He only states that he along with others lifted Arvind and brought him to the road and thereafter Arvind’s wife and others carried him to the hospital. All this is totally false and bogus evidence. This is therefore a case where this court is not required to go to the cross examination of any of the aforesaid witnesses. Their evidence in chief and FIR totally and completely falsify their story

and it lends strength and support to the defence of the accused, though not directly placed, that it was the complainant's side that launched an attack on them at their house wherein accused suffered injuries at the hands of the complainants, viz. Murlidhar, Prema, etc. When therefore on the face of it, the case of the prosecution is found to be false, full of improvements with no explanation whatsoever coming regarding the injury suffered by all the three accused, then it has to be totally discarded and accused are entitled for acquittal.

22. When pointed out all the circumstances, the Learned APP tried to contend that there is evidence of recovery etc. but that cannot help the prosecution in proving the case, and, we are not at all inclined to accept or rely upon that evidence. When the story of the prosecution is itself required to be rejected for all the aforesaid reasons and that story relates to the ocular version given by the witnesses with that of FIR, other evidence looses its value. Therefore, this Appeal is required to be allowed. In the result, we pass the following order:

ORDER

. Appeal is allowed. Conviction of all the accused under Section 307 read with Section 34 and under Section 302 read with Section 34 of the Indian penal Code is set aside. They are acquitted of the offences and they be released forthwith, if not required in any other case.

(D.G. DESHPANDE, J.)

(Smt. R.S. DALVI, J.)